In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM — 1939

Number 18

HAROLD F. SNYDER,

Petitioner,

vs.

CITY OF MILWAUKEE,

Respondent.

BRIEF FOR RESPONDENT.

WALTER J. MATTISON,
Counsel for Respondent,
City of Milwaukee.

INDEX.

CASES CITED.

Cases Cited—*Continued.*

Cases Cited—*Continued.*

TEXT BOOKS CITED.

MILWAUKEE CODE CITED.

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM — 1939

Number 18

HAROLD F. SNYDER,

Petitioner,

vs.

CITY OF MILWAUKEE,

Respondent.

BRIEF FOR RESPONDENT

The decision and judgment below is officially reported in *City of Milwaukee vs. Harold F. Snyder*, 283 N. W. 301, decided January 10, 1939 (R. 20). This case affirms a prior decision on the identical ordinance reported in *Milwaukee vs. Kassen*, 203 Wis. 383.

The question raised upon this appeal is the validity of Section 865 of the Milwaukee Code of 1914, as amended. This ordinance prohibits the throwing of rubbish and dirt upon the streets of the city, and also prohibits the distribution of handbills, circulars, dodgers or advertising matter upon the streets, sidewalks, alleys, wharves, public grounds, etc. within the City of Milwaukee.

THE ORDINANCE.

The ordinance which has been in force and effect many years in the City of Milwaukee provides as follows:

"CHAPTER XVII.

HEALTH

ARTICLE 16

Garbage, Rubbish, Nauseous Substances and Odors Throwing Filth, Rubbish or Nauseous Substances on Streets, etc.

Section 865. It is hereby made unlawful for any person, firm or corporation, or for any officer, member, agent, servant or employe of any firm or corporation to place, throw or leave any slops, dirty water or other liquid of offensive smell, or otherwise nauseous or unwholesome, or any dead carcass, carrion, meat, fish, entrails, manure or other nauseous or unwholesome matter or substance, or any rubbish, ashes, paper, dirt, stones, bricks, manure, tin cans, boxes, barrels or other substances whatsoever or to circulate or distribute any circular, hand bills, cards, posters dodgers or other printed or advertising matter, or to drain or pour, or to permit to drain or flow oil, kerosene, benzine or other similar oil or oily substance or liquid, in or upon any sidewalk, street, alley, wharf, boat landing, dock or other public place, park or ground, within the City of Milwaukee. Provided, however, that this section shall not apply to any garbage, manure, ash boxes or receptacles, which are built and maintained not less than twelve inches above the grade of the alley, nor more than three feet from the line of any lot or parcel of land abutting upon any alley in said city. Said boxes so built and maintained shall be waterproof, and shall at all times be kept securely covered except when depositing or removing the contents therefrom."

STATEMENT OF FACT.

For the purpose of correcting inaccuracies and omissions in the statement of fact contained in the brief for petitioner, the respondent makes the following statement of fact.

On May 27, 1938, the defendant and petitioner stood at or near the Shinner Meat Market at 1306 W. Vliet Street, in the City of Milwaukee, Wisconsin, and distributed handbills to pedestrians on the street. The contents of the handbills pertained to a labor dispute with the Shinner Meat Market, the petitioner acting in the capacity of a picket (R. 2).

The petitioner had an armful of handbills and handed out these bills to persons walking by, some of the people dropping them on the sidewalk or in the gutter. Others walked several feet and then crunched them in their hands and threw them on the walk (R. 13).

Some of the handbills observed by the police officers were lying on the walk on the north side of Vliet Street. Some of them were lying in the gutter on the north side of Vliet Street (R. 13). The handbills which had been distributed by petitioner were lying around on the street and sidewalk in the vicinity. These were the handbills which had been given to various pedestrians by the petitioner and which were dropped by these pedestrians (R. 14).

There were numerous handbills of the same type lying on the south side of Vliet Street, in the gutter. Some of these on the street car tracks were run over by the wheels of the eastbound street cars. They were sticking to the track. Some of them were lying up against the safety zone on the southwest corner of 13th and Vliet Streets. There were dozens of handbills lying up against the gutter on the side of Vliet Street (R. 14).

This evidence was undisputed (R. 2).

ARGUMENT.

The City of Milwaukee, the respondent, contends that the ordinance in question is valid:

(1) Because the regulation of the use of streets, alleys, public places, etc., in the prevention of the littering of the streets and the promotion of the general welfare, health and safety of the residents of the city using the streets is a legitimate field for police regulation, and the City of Milwaukee has authority in respect to such matters;

(2) Because the means adopted by the Common Council as well as by the police department for enforcement of such ordinance, are legitimate and reasonable methods of regulation.

I.

The ordinance was enacted under ample authority.

The case of *Lovell vs. City of Griffin*, 303 U. S. 444, 82 L. Ed. 660, 58 Sup. Ct. 666, is greatly relied upon by appellant in his brief. The ordinance involved in the *Griffin* case was held to be pre-publication censorship and therefore unconstitutional in that it attempted to delegate to the city manager of the city of Griffin the power to censor but the court very specifically recognized the very principle on which the Wisconsin Supreme Court sustained the Milwaukee ordinance when Chief Justice Hughes was careful to state that the ordinance in question is not limited to "literature" that is obscene or offensive to public morals, nor to methods of distribution "which might be regarded as inconsistent with the maintenance of public order, or as involving disorderly conduct, by molestation of the inhabitants or the misuse or littering of the streets."

See also,

Philadelphia vs. Brabender, 201 Pa. 574, 51 Atl. 374 (1901).

The ordinance of the *City of Griffin* declared unconstitutional is as follows:

> "*Section 1.* That the practice of distributing, either by hand or otherwise, circulars, handbooks, advertising, or literature of any kind, whether said articles are being delivered free, or whether the same are being sold, within the limits of the City of Griffin, without first obtaining written permission from the city manager of the City of Griffin, such practice shall be deemed a nuisance, and punishable as an offense against the City of Griffin.
>
> "*Section 2.* The chief of police of the City of Griffin and the police force of the City of Griffin are hereby required and directed to suppress the same and to abate any nuisance as is described in the first section of this ordinance."

In the Wisconsin case of *Milwaukee vs. Kassen*, 203 Wis. 383, 234 N. W. 352, the court determined the handbill ordinance of the City of Milwaukee, Section 865 of the Milwaukee Code of 1914, as amended, was valid and constitutional. The exact language of the ordinance complained about in the instant case formed the basis of the decision in the *Kassen* case. The rule there laid down has not been modified in any respect.

This leaves for consideration the question of whether the rule laid down in *Milwaukee vs. Kassen* has been abrogated and overcome by the decision in the *Lovell vs. Griffin* case. This case is not ruled by *Lovell vs. Griffin*. A comparison of the ordinances in the two cases discloses that they are clearly distinguishable. The ordinance in the

Griffin case attempted to delegate to the city manager of Griffin pre-publication control under the guise of regulation. There is no interference of the right to free speech or free press in this "handbill" ordinance of the City of Milwaukee, which is directed solely at the littering of the streets.

San Francisco Shopping News Co. vs: City of South San Francisco, 9 Cir. 1934; 69 F. (2d) 879, certiorari denied 293 U. S. 606, 55 S. Ct. 122, 79 L. Ed. 697.

In the case of *In Re Thornburg*, 9 N. E. (2nd Series) (Ohio) 516, the ordinance in question prohibited the distribution of handbills, circulars, cards or other advertising by handing the same to pedestrians on a public alley, street or ground within a congested district of the city or by the placing of the same in or upon any motor vehicle in use or parked upon the streets in the said congested district and was declared to be a nuisance and unlawful. The constitutionality of the ordinance was sustained.

In the dissenting opinion Judge Terrell stated:

> "It can fairly be seen from a reading of the ordinance in question that two of the purposes for the enactment of this ordinance are, first, to prevent congestion of pedestrian traffic upon the sidewalks and streets in the congested districts of the city; and, second, to prevent the unnecessary cluttering of sidewalks and streets in congested districts with unwanted advertising matter. It reasonably follows that there is a great likelihood that advertising cards, handbills and circulars that are indiscriminately distributed free to people on the public highways, will result in cluttering the streets with such cards and papers which are unwanted. There is also a great likelihood that should the citizens deem such cards and circulars or other matter to have any value, there

might be a great clamor for the free gift thereof which would tend to cause obstructions of the sidewalks and the streets. No person has an inherent right to conduct his business upon the public streets and sidewalks of the city. The distributing of advertising circulars and cards is part of a business. The city council in the exercise of its police power may prohibit the carrying on of such business on the public streets and highways."

As a general rule whatever is contrary to public policy or inimical to the public interests is subject to the police power of the state.

In *People vs. Horwitz*, 27 N. Y. Criminal Reports 237, 140 N. Y. Suppl. 437, 439, the validity of the following ordinance was sustained:

> "That no person shall throw, cast or distribute in or upon any of the streets or public places, or in front yards or stoops, any handbills, circulars, cards or other advertising matter whatsoever."

In *Allen vs. McGovern*, 169 Atl. 345 (N. J. 1933) the ordinance prohibited distribution of unsolicited advertising matter to householders. It was held not unconstitutional as unreasonable interference with the right to choose an occupation and to advertise merchandise. The court stated:

> "City life is very complex. There can be no doubt that the city can prevent the misuse of the streets. But can it prevent the distribution to householders of unsolicited advertising matter? We think it can. * * *
>
> "Ordinances have been long upheld as within the police power when the design was to prevent the cluttering of the streets and the frightening of horses. * * * There are restraints upon everyone for the common good. The city commissioners, being familiar with the local conditions are primarily the judges of the necessity."

See also:

Jacobson vs. Mass., 197 U. S. 11, 25 S. Ct. 358, 49 L. Ed. 643.

In *Goldblatt Bros. Corporation vs. City of East Chicago*, Indiana (1937) 6 N. E. (2d) 331, the ordinance prohibited the distribution of written advertising matter by placing the same in automobiles, yards, porches, mail boxes, etc., not in possession or under the control of the person, etc. so distributing, newspapers being exempted from the provisions of the ordinance. The court said:

> "The evident purpose of this clause is to enable the city to prevent unwholesome or waste materials from accumulating upon private property. One of the most reasonable means of accomplishing this end is to prevent the unauthorized throwing of substances, which may become waste material, upon private property. It is obvious that the more waste accumulated, the more the expense of the city or property owner in removing it. * * * A city has unquestioned right to remove garbage, ashes, debris, and waste matter that collects upon the property of its citizens. The prevention of unnecessary scattering of material that may become waste is a protection to the municipality itself, since, if waste matter is minimized, the expense of removing it will be less."

In *McQuillin on Municipal Corporations* (2d Edition), Volume 3, Section 948, it is said:

> "Crowded urban populations require numerous police regulations which would be unreasonable in rural districts or sparsely populated territory. This difference was early recognized, and from the first establishment of public corporations, invested with civil government, the local community has been empowered to enact and enforce various kinds of such regulations which restrict more or less the liberty of

the individual, his personal movements and the use of his property. These are essential to the enjoyment of life in crowded centers. From the beginning their necessity has been sanctioned by the public authorities and they have been sustained generally by the courts."

Assuming, for the sake of argument, that the case of *Lovell vs. Griffin*, 303 U. S. 444, 82 L. Ed. 660, 58 Sup. Ct. 666, is substantially in conflict with the construction of the Milwaukee handbill ordinance and the ruling of the Wisconsin Supreme Court on its validity in the case of *Milwaukee vs. Kassen*, 203 Wis. 383, we believe this court will follow the Wisconsin decision. The rule which has been consistently handed down by this court is:

> "The general rule is that the construction (of a state statute) given by the highest court is conclusive on the Supreme Court of the U. S. where the question involved is whether such statute is repugnant to the federal constitution; and when such interpretation renders it constitutional and valid legislation it will not be disregarded by the U. S. Supreme Court, and a different construction given to the statute which will make it repugnant to the federal constitution.'" (6 Ruling Case Law, 86 (Const. Law, Section 85).)

Also:

Marine Nat. Exchange Bank vs. Kalt-Zimmers Mfg. Co., 293 U. S. 357, 361, 79 L. Ed. 427, 432;

Bandini Petroleum Co. vs. Superior Ct., 284 U. S. 8, 78 A. L. R. 826, 833;

Wolff Packing Co. vs. Court of Ind. Rel., 262 U. S. 522, 27 A. L. R. 1280, 1290;

Pierce Oil Corp. vs. Hopkins, 264 U. S. 137, 68 L. Ed. 593, 596;

C. M. & St. P. & P. R. Co. vs. Risty, 276 U. S. 567, 72 L. Ed. 703, 707, 27 R. C. L. 44-46.

Freedom of the press must of course in our political system be guaranteed and must be guarded against from subtle encroachments. However, like other constitutional rights, it is subject to reasonable rules formulated to serve the public interest and to prevent abuse in the manner of the exercise of the right, as long as the right itself is neither suspended nor abrogated. This principle has been many times recognized in recent decisions of this court.

Gitlow vs. New York, 268 U. S. 652, 666, 667;
Whitney vs. California, 274 U. S. 357, 371;
Stromberg vs. California, 283 U. S. 359, 368;
Near vs. Minnesota, 283 U. S. 697, 707, 708;
DeJonge vs. Oregon, 299 U. S. 353, 364;
Commonwealth vs. Blanding, 3 Pick. 304, 313;
Commonwealth vs. Libbey, 216 Mass. 356;
Commonwealth vs. Karvonen, 219 Mass. 30;
Commonwealth vs. Anderson, 272 Mass. 100, 106.

In the case of *Frend et al. vs. United States*, 100 F. (2d) 691 (decided October 31, 1938) the defendants were convicted of parading in the public streets in front of the Austrian or the German Embassy with a number of other persons, some of whom were carrying banners and placards which were intended and calculated to bring into contempt the German government. This was in the City of Washington, D. C. The defendants were convicted for violating a joint resolution of Congress prohibiting a display of flags, banners, placards or devices intended to bring any foreign government into public odium, within 500 feet of an embassy, legation or consulate in the District of Columbia. The court went on to say:

"The resolution, interpreted in the light of its purpose and according to the limitations of the Constitution, places no restriction upon speech or assembly except to the extent that they may constitute

offensive public demonstrations calculated to arouse passions and resentments in those governments with which we have official relations, and then only when such offensive conduct is committed upon the public streets immediately adjacent to embassies, legations, consulates, and other buildings used for official purposes by such governments. These are reasonable and proper restrictions. In them there is no abridgement of the right of speech or of assembly or of any other constitutional right of the citizen. It has never been considered that the right in the public to use the streets is unlimited or that it may be exercised in defiance of the laws of the United States or the States. On the contrary, it has always been considered that a municipality may control and regulate the use of the streets in the general good; and this has often been held to include the preventing of loud noises, shooting of guns, assembling of crowds, and the routing of parades. The control or prohibition of any of these things cannot be regarded as interfering with the constitutional right of assembly or of speech, U. S. C. A. Const. Amend. 1. Nor is there anything in the Fifth Amendment to the Constitution, U. S. C. A. Const. Amend. 5, which invalidates this exercise of the police power in the respects mentioned."

The decisions demonstrate conclusively that the construction of the ordinance given by the highest court of the State of Wisconsin relative to the validity of the ordinance in question as set forth in the cases of *Milwaukee vs. Kassen*, 203 Wis. 383, 234 N. W. 352, and *Mittleman vs. Nash Sales, Inc.*, 202 Wis. 577, as well as the instant case, would be binding upon the Supreme Court of the United States.

II.

A — The means adopted are legitimate and reasonable means of regulation.

Petitioner contends that the proof shows that the ordinance was being enforced in an unreasonable and discriminatory manner, and alleges if such is the case such practice on the part of the police department would fall within the condition of *Yick Wo vs. Hopkins*, 118 U. S. 356, 30 L. Ed. 220. The only testimony with reference to this respect, was given by the two police officers and the deputy inspector of police who testified that where handbills and circulars are littering the streets the policy of the police department is to arrest the "one who is the cause," the distributor of handbills in instances where handbills litter the streets. The testimony was clear that no one was arrested for distributing except in cases where the handbills distributed were observed to be littering the streets (R. 6 and 17).

In the *Yick Wo* case the ordinance there pertained to the regulation of laundries and was admittedly enforced only against the Chinese. This court held there was a denial of equal justice. However, the evidence did not show that the ordinance was being directed "at a class of persons for the purpose of suppressing the free expression of their views, rather than for the purpose of preventing the littering of the public streets" (Quotation from *Kassen* case id. p. 389). The counsel for petitioner in their brief admit that they do not dispute that municipalities may punish street littering (p. 8 of their brief). The testimony in the instant case was that there was actual littering of the streets caused by the distribution of handbills by the petitioner (R. 9, 10, 12, 13, 14).

There is no question, therefore, but that the method of enforcement of the ordinance by law officers of the City of Milwaukee was absolutely valid.

In *Manos vs. City of Seattle, et al.* (1927), 262 Pac. 965, it was argued that the administration of a Seattle ordinance had been discriminatory. The language of the court in the *Manos* case is strongly in favor of the contention of the City of Milwaukee. It is as follows:

> "There was evidence introduced tending to show that the city had issued licenses for dance halls within the prohibited area, and that the board of park commissioners had issued a license granting the privilege of conducting a public dance hall in one of the public parks. While we are not convinced that the evidence conclusively establishes the facts to which it was directed, but were we to concede that it did so, we could not conclude that it avoided the ordinance. The ordinance itself does not permit of discrimination between persons on the part of the officers whose duty it is to enforce it, and the remedy for its maladministration on their part is not to declare the ordinance void. Few laws would have force or effect if their validity depended upon the question whether they were always impartially administered."

It was held in *Marblehead Land Co. vs. Los Angeles* (U. S. C. C. A.), 47 F. (2d) 528, 532, affirming 36 F. (2d) 242, that when the unreasonableness or arbitrariness in the exercise of the police power is fairly debatable, courts will sustain the ordinance.

There can be no question in the instant case but that the ordinance was enacted for the public welfare; that is, to prevent misuse of, befouling of, and littering of the streets.

The case of *Milwaukee vs. Kassen*, 203 Wis. 383, is controlling upon the court in that respect as having interpreted the identical ordinance under identical circumstances as are presented in the instant case, where the Supreme Court of the State of Wisconsin declared that the ordinance did mean littering of the streets, citing a previous Wisconsin decision.

B — Practical construction.

From the force of circumstances and conditions necessarily arising in the administration of the affairs of the government, both state and national, it is evident that those who are charged with official duties, whether executive, legislative, or judicial, must necessarily construe the constitutions and laws in numerous instances. *Marbury vs. Madison*, 1 Cranch (U. S.) 137, 2 L. Ed. 60.

Every department of the government, i. e., the police department, invested with certain constitutional powers, must, in the first instance at least, be the judge of its powers, or it could not act.

It has been contended in this case that the enforcement of the Milwaukee handbill ordinance worked a hardship upon a certain group of persons, but it has been held in numerous instances in controlling cases that where a constitutional provision is plain and unambiguous, the fact that its enforcement may work great inconvenience or hardship to particular persons or a particular class furnishes no ground for courts, by construction, to prevent or evade its evident purpose. *People ex rel Darling vs. Warden of City Prison*, 154 App. Div. 413, 139 N. Y. S. 277.

As to a definition of the police power, it was said in *Cooley Constitutional Limitations* (6th Ed.), 704, quoting *Meadowcroft vs. People*, 163 Ill. 56, 65, 45 N. E. 303, that—

"The police power of a state, in a comprehensive sense, embraces its system of internal regulation by which it is sought not only to preserve the public order and to prevent offenses against the state, but also to establish for the intercourse of citizen with citizen, those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights and to insure to each the uninterrupted enjoyment of his own so far as is reasonably consistent with a like enjoyment of rights by others."

Consequently the interpretation of true liberty and freedom means that a person may enjoy certain rights as long as they do not interfere with the paramount interest of the entire people or of fellow citizens. Where the ordinance, therefore, was enacted for the welfare of the people of Milwaukee as a health and cleanliness measure, the validity of the ordinance must be sustained.

Francis vs. People of Virgin Island, 11 Fed. (2d) 860, holds that freedom of the press or of speech is not unlimited but to be exercised with regard to other rights accorded the people.

Burkitt vs. Beggans (1928), 142 Atl. 181, 103 N. J. Eq. 7, holds that city authorities have discretion in granting or denying a permit to make public speeches on streets, not withstanding the constitutional guaranty of free speech.

People on Complaint of O'Connor vs. Smith, 188 N. E. 745, 263 N. Y. 255, sustains a city ordinance requiring a permit to expound atheism in public streets, is not unconstitutional as depriving exhorters of atheism of freedom of speech.

The court will observe that the Milwaukee ordinance uses the terms "circulate" and "distribute." The word

"distribute" is defined as to divide among several or many; to deal out; apportion; allot. *Young vs. Sinsabaugh*, 173 N. E. 784, 342 Ill. 82.

Great Atlantic and Pacific Tea Company vs. Morrissett (D. C. Va.), 58 Fed. (2d) 991, 993, holds that to "'distribute" is to divide among several or many.

It is apparent from these authorities there was no such thing in the enforcement of the Milwaukee ordinance as would indicate arbitrary or unjust discrimination in favor of one class as against another class. The police department, using the ordinary understanding of the word "distribute," interpreted it to mean the passing out of handbills on the streets, highways, alleys, and public places of the City of Milwaukee.

An isolated instance of where one individual, having received a handbill, inadvertently permits it to fall to the pavement, would certainly not constitute littering the streets, the word "littering" meaning the falling of more than one, or numerous handbills to the pavement. But the uncontroverted testimony in the instant case indicates that there was littering on Vliet Street at the place alleged by the city. In fact counsel for petitioner themselves admit that the petitioner was convicted of having distributed the literature in a manner such that street littering resulted (p. 17 of brief for petitioner).

III.

Rebuttal.

Decisions relied upon by petitioner do not disclose a conflict of authority.

People vs. Armstrong, 73 Mich. 288, 41 N. W. 275, found on page 12 of petitioner's brief, involved the distribution of Y. M. C. A. circulars. In that case there was no littering of the streets by the handbills. The case of *C. I. O. vs. Hague*, 25 F. Supp. 127, found on page 13 of petitioner's brief is not in point because in that case the mayor attempted to act as sole arbiter as to what persons should have the right to distribute circulars or to conduct meetings in Jersey City, and the right to circularize handbills or to conduct meetings was dependent upon the mayor's approval of such meeting or handbill.

The City of Milwaukee is not interested as to the contents of the circulars but rather pertains to the form of the leaflet and the facility with which its distribution generally and usually results in the clattering up and clogging of sewers, and cluttering up of streets resulting from the accumulation of waste material on the streets of the City of Milwaukee and presenting a distinct fire hazard.

The purpose of the Milwaukee ordinance was entirely lawful in that it is aimed solely and directly at preventing the littering of the streets of the city.

CONCLUSION.

There can be no question but that the handbill ordinance of the City of Milwaukee, Section 865 of the Milwaukee Code of 1914, is constitutional and valid and the method of its enforcement is a valid method.

It is therefore respectfully submitted that the ordinance being a valid regulation passed under ample authority, the method of its enforcement constitutes a reasonable exercise of the police power of the municipality and that the judg-

ment of conviction and the complaint should be both sustained.

Respectfully submitted,

WALTER J. MATTISON,
Counsel for Respondent,
City of Milwaukee.